



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 95 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLES 2, 10, 22, 23, 21, 29, 41, 43, 47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: SECTION 66, 68, 69, 72 OF THE PUBLIC SERVICE COMMISSION ACT

AND

IN THE MATTER OF: FAIR ADMINISTRATION OF ACTIONS ACT

AND

IN THE MATTER OF: OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION HUMAN RESOURCE MANAGEMENT MANUAL

BETWEEN

DAVID MUTHUI NDEGWA..... PETITIONER

VERSUS

OFFICE OF THE DIRECTOR OF

PUBLIC PROSECUTION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL..... 2ND RESPONDENT

RULING NO. 2

1. Before me for determination is the Petitioner’s Notice of Motion Application dated 15th November, 2019 seeking the following orders:
 - a. *That this Court be pleased to allow the Applicant/Petitioner to amend the Petition dated 12th June 2019 as per the annexed enclosed draft amended Petition;*
 - b. *That costs be in the cause.*

2. The application is premised on the grounds that:
 - i. *The Petition dated 12th June 2019 was filed on 5th July 2019 and served on 11th July 2019.*
 - ii. *The matter is yet to be issued with a hearing date and is still at the preliminary stages hence brought in a timely manner as pleadings are not yet closed.*

iii. The amendments sought do not seek to raise a new issue but to better particularize the issues raised in the Petition.

iv. The objective of the amendments is to enable the parties to litigate between them on basis of the true state of facts and law.

3. The application is further supported by the affidavit of David Muthui Ndegwa, the Petitioner herein.

4. In opposition, the 1st Respondent filed of a notice of preliminary objection dated 10th March 2020 stating that the Petition is statutorily time barred and grossly offends the mandatory provisions of Section 4(1) of the Limitation of Actions Act as read together with Section 90 of the Employment Act thus the Petition. As such it urges the court to strike it out. It also argues that the application to amend the Petition is frivolous, mischievous and otherwise a blatant abuse of the court process and should be dismissed *sua sponte*.

5. The Application was disposed of by way of written submissions.

Applicant/Petitioner's Submissions

6. The Applicant/Petitioner submitted that there is a need to amend the Petition to better particularize the issue raised to enable the parties to litigate between themselves on the basis of the true state of fact and law. In addition, the amendments do not seek to raise new issues and that the application has been brought in a timely manner.

7. The Applicant submitted that it is trite law to allow amendments in order to avoid multiplicity of suits as long as said amendments do not alter the subject cause of action drastically. He relied on the case of **Central Bank of Kenya Ltd v Trust Bank Ltd (2002) 2 E.A 365** to support his position.

8. In response to the 1st Respondent's Preliminary Objection, the Applicant/Petitioner submitted that the suit is not time barred as the same was brought forth within the three years limit period.

1st Respondent's Submissions

9. The 1st Respondent submitted that the ingredients of a preliminary objection as provided for in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696** had been met and therefore urged the court to strike out the application together with the petition dated 12th June 2019.

10. The 1st Respondent also submitted that while the court has unfettered jurisdiction to allow amendment of pleadings, the same discretion may only be exercised judicially in tandem with the celebrated principles in **Central Bank of Kenya Ltd v Trust Bank & 4 others (supra)**.

11. It submitted that based on the above, the applicant had inordinately delayed in seeking the said amendment since the petition was filed on 12th June 2019. As such, it argued that the amendment was an afterthought and designed to impede the court's obligation to expeditiously dispose of cases.

12. The 1st Respondent argued that the amendments have not cured any defects if the petition and has similarly failed to satisfy the threshold of specificity as espoused in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR. 2nd Respondent's Submissions**

13. Although the 2nd Respondent had not filed any pleadings in response to the Application herein, it filed submissions on 28th September 2021.

14. It submitted that the amendments sought by the Petitioner is an afterthought and it should not be allowed. That the Petitioner seeks to introduce provisions of the Constitution that have been violated which he had not cited at the point of filing the Petition.

15. The 2nd Respondent submitted that this court lacks jurisdiction to handle both the Petition and the Application for amendment given that the same had been anchored on the breach of the constitution and not the Employment Act. It concluded that the prayer for amendment is not merited and urged the court to dismiss it.

Analysis and Determination

16. I have considered the pleadings of the practices. The issues for determination are whether the applicant should be granted leave to amend the petition and whether the preliminary objection is merited.

17. Amendment of pleadings is provided for in Rule 13(6) of the Employment and Labour Relations Court (Procedure) Rules as follows:

A party may amend pleadings before service or before the close of pleadings:

Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.

18. Amendment of pleadings is further provided for in Order 8 Rules 3 and 5 of the Civil Procedure Rules as follows:

[Order 8, rule 3.] Amendment of pleading with leave.

(1) **Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.**

(2) **Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.**

(3) **An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.**

(4) **An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.**

(5) **An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.**

19. The Court has very wide discretion to allow parties to avail pleadings, the only limitations being those stated by the court in **Central Bank of Kenya Ltd v Trust Bank Ltd [2002] EA 365** where the Court of Appeal stated that the only considerations to be taken by the court in an application for leave to amend are:

(i) *Prejudice to the other parties;*

(ii) *Whether the amendments would unduly delay the resolution of the issue in controversy between the parties;*

(iii) *Whether the amendments are necessary for the just determination of the suit.*

(iv) *That delay is not a ground for declining leave to amend unless the delay would prejudice the other parties.*

20. In the instant application the Respondents have not cited any of those grounds. Suffice to mention here that none of the Respondents filed a response to the application. In the submissions, the only reason given by the 2nd Respondent for the court to decline the proposed amendment is that the amendments should have been included in the petition at the time of drafting the petition, which is essentially the reason that the law permits amendment of pleadings.

21. The other grounds in the 2nd Respondent's submissions are irrelevant to the application.

22. It follows that none of the Respondents have provided any valid reasons as to why the court should not grant leave for amendment of the petition as prayed in the application.

23. On the preliminary objection, the issue whether or not the suit is statutory barred is disputed by the Petitioner. The reason the Petitioner came to court is that his interdiction breached his rights to fair labour practice and his rights to fair administrative action while also violating the internal rules and regulations under the ODPPS Human Resource Manual. Whether or not such a claim arises on the date of interdiction as alleged by the Respondents is a matter that can only be resolved by evidence.

24. A preliminary objection, was defined in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** as consisting of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which is argued on the assumption that all the facts pleaded by the other side are correct. Newbold P. further stated that:

"It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

25. The issue on when the cause of action herein arose is a matter that the court will have to determine after hearing the parties. It is not ascertainable at this stage. The circumstances of this suit are therefore not susceptible of a preliminary objection.

26. Having held as above, I find the preliminary objection filed by the 1st Respondent to be without merit and dismiss the same.

27. The application to amend the petition is allowed. The Petitioner is directed to file the amended petition within 14 days.

28. Costs of both applications shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF MARCH 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE